IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 22, 2006 Session

IN RE S.M.N.

Appeal from the Juvenile Court for Knox County
No. 62153 Cynthia Chapman, Special Judge

No. E2005-01974-COA-R3-PT - FILED JUNE 30, 2006

The trial court terminated the parental rights of S.A.N. ("Father") to his minor child, S.M.N. (DOB: April 21, 2001), upon finding, by clear and convincing evidence, (1) that Father abandoned the child and (2) that termination of Father's parental rights is in the child's best interest. Father appeals, arguing that Tenn. Code Ann. § 36-1-113(f)(3) is unconstitutional in that it gives trial courts the discretion to determine whether a prisoner is entitled to be physically present in the courtroom during a proceeding involving the termination of the prisoner's parental rights. In addition, Father challenges the sufficiency of the pleadings and whether the evidence establishes abandonment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Joseph F. Della-Rodolfa, Knoxville, Tennessee, for the appellant, S.A.N.

Timothy A. Housholder, Knoxville, Tennessee, for the appellees, L.C. and her husband, K.C.

Paul G. Summers, Attorney General and Reporter, and Amy T. Master, Assistant Attorney General, for the intervenor, State of Tennessee.

OPINION

I.

The child was born to P.S.N. ("Mother") and Father. Mother was incarcerated at the time of the child's birth. Following the child's birth, Mother took up residence in a halfway house. The child was released from the hospital in early May and lived with Mother in the half-way house for a brief period of time. While the time period is not entirely clear from the record, it appears that

Mother was arrested for drug use in mid-May, at which time the child was placed in the custody of Father. After having custody of the child for no more than five or six hours, Father contacted the plaintiff L.C., his maternal aunt, and asked her to "come get this baby." From that point forward, no one other than L.C. and her husband, K.C., ("the plaintiffs") had custody of the child. The plaintiffs petitioned the trial court for temporary custody of the child on May 29, 2001, which petition was granted on July 3, 2001.

On November 9, 2001, Father was arrested and charged with aggravated robbery and carjacking. Father was released on bond on November 21, 2001. He later pleaded guilty and was incarcerated on December 11, 2001. At the time of trial, Father was serving his sentence in a federal penitentiary in Lee County, Virginia.

The plaintiffs filed a petition to terminate Father's parental rights[1] on July 6, 2004. The petition alleges abandonment. The court conducted a hearing on June 9, 2005. While the court granted Father's request to be present for the hearing, the federal authorities refused Father's request to be transported to Knoxville for the hearing. As a result, Father participated in the hearing via telephone.

On July 8, 2005, the trial court entered an order terminating Father's parental rights,[2] finding, in pertinent part, as follows:

> This court has determined by clear and convincing evidence that the [plaintiffs] have established that [Father] has abandoned the child in that [Father] failed to visit with or support the child in the six [sic] months preceding his incarceration and, further, that such failure to visit or support the child was willful.
>
> Termination of [Father's] parental rights to this child is in the best interest of the child.
>
> The following evidence supporting this finding cumulatively constituted clear and convincing evidence of grounds and determination of the child's best interest:
>
> The Court believes that [Father's] testimony was not credible and that the testimony of the [plaintiffs] was credible and should be accorded the greatest weight.

[1] No one questions the plaintiffs' standing to file the instant action.

[2] Mother's parental rights were terminated by default judgment entered June 28, 2005. The trial court's judgment with respect to Mother's parental rights is not before us on this appeal.

> The Court has very strong feelings that the level of contact with and support of the child by [Father] do not even rise to the level of "token" contact and/or support.
>
> The Court feels very strongly that [Father] has never provided the child with physical, emotional, or financial support, and that the only source of support for the child in this regard is, and has always been, the [plaintiffs]. . . .

(Paragraph numbering and lettering in original omitted). Thereafter, Father filed a timely notice of appeal. In October, 2005, Father filed a motion in the Court of Appeals seeking to add the State of Tennessee as a party to the appeal in order to address the constitutionality of Tenn. Code Ann. § 36-1-113(f)(3). This court granted Father's motion, and the Attorney General filed a notice of intervention in defense of the statute.

II.

In this non-jury case, our review of the trial court's factual findings is *de novo*; however, the case comes to us accompanied by a presumption that those findings are correct – a presumption that we must honor unless the evidence preponderates against the trial court's factual findings. Tenn. R. App. P. 13(d); ***Musselman v. Acuff***, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). Our search for the preponderance of the evidence is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995); ***Bowman v. Bowman***, 836 S.W.2d 563, 566, 567 (Tenn. Ct. App. 1991).

III.

The law is well-established that "parents have a fundamental right to the care, custody, and control of their children." ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing ***Stanley v. Illinois***, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). This right, however, is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. ***Santosky v. Kramer***, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." ***O'Daniel v. Messier***, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

Tenn. Code Ann. § 36-1-113(g) lists the grounds upon which parental rights may be terminated, and "the existence of any one of the statutory bases will support a termination of parental rights." ***In re C.W.W.,*** 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000). The issues raised in the pleadings, and the trial court's findings, implicate the following statutory provisions:

Tenn. Code Ann. § 37-1-147 (2005)

(a) The juvenile court shall be authorized to terminate the rights of a parent or guardian to a child upon the grounds and pursuant to the procedures set forth in title 36, chapter 1, part 1.

* * *

Tenn. Code Ann. § 36-1-113 (2005)

(a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, . . . by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.

* * *

(c) Termination of parental or guardianship rights must be based upon:

(1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and

(2) That termination of the parent's or guardian's rights is in the best interests of the child.

* * *

(f) Before terminating the rights of any parent or guardian who is incarcerated or who was incarcerated at the time of an action or proceeding is initiated, it must be affirmatively shown to the court that such incarcerated parent or guardian received actual notice of the following:

* * *

(3) That the incarcerated parent or guardian has the right to participate in the hearing and contest the allegation that the rights of the incarcerated parent or guardian should be terminated, and, at the discretion of the court, such participation may be achieved through personal appearance, teleconference, telecommunication or other

means deemed by the court to be appropriate under the circumstances;

* * *

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in [Tenn. Code Ann.] § 36-1-102, has occurred;

* * *

Tenn. Code Ann. § 36-1-102 (2005)

As used in this part, unless the context otherwise requires:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:

* * *

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child;

* * *

(B) For purposes of this subdivision (1), "token support" means that the support, under the circumstances of the individual case, is insignificant given the parent's means;

(C) For purposes of this subdivision (1), "token visitation" means that the visitation, under the circumstances of the individual case,

> constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child;
>
> (D) For purposes of this subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child;
>
> (E) For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation; . . . .

IV.

A.

Father raises three issues on appeal:

> 1. Does an incarcerated parent have a constitutional right to be present at a termination of parental rights hearing, such that Tenn. Code Ann. § 36-1-113(f)(3) should be struck down as unconstitutional?
>
> 2. Did the petition for termination of parental rights sufficiently allege grounds for termination, such that Father could properly prepare a defense?
>
> 3. Did the evidence presented at trial support the trial court's finding of abandonment?

We will address each of these issues in turn.

B.

First, Father contends that Tenn. Code Ann. § 36-1-113(f)(3) is unconstitutional. He argues that the statute is deficient in that it does not guarantee an incarcerated parent the right to be physically present at the hearing to terminate his or her parental rights. Specifically, Father alleges

that the statute violates the Fourteenth Amendment to the United States Constitution[3] and Article I, §§ 8[4] and 9[5] of the Tennessee Constitution. Father argues that, just as the constitution guarantees that a defendant in a criminal trial has the absolute right to be present at every phase of the trial, so too should an incarcerated parent have the absolute right to be present at a termination hearing in order to defend against a termination of parental rights.

Initially, the State responds to this argument by asserting that Father did not raise this issue before the trial court, and that, accordingly, Father cannot raise it for the first time on appeal. *See* ***Simpson v. Frontier Cmty. Credit Union***, 810 S.W.2d 147, 153 (Tenn. 1991). Our review of the record reveals that there was only one reference to a constitutional issue made during the termination hearing:

> [The Court:] So you are asking to go forward today with your client present only by telephone.
>
> [Counsel for Father:] Reserving our 5th and 14th . . . I would ask the Court to continue [the hearing] until my client is available to be here

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[3] The Fourteenth Amendment provides, in pertinent part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

[4] Article I, § 8 provides as follows:

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Tenn. Const. art. I, § 8.

[5] Article I, § 9 provides as follows:

> That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

Tenn. Const. art. I, § 9.

> and that would take care of any 5th and 14th amendment issues we may have.

The trial court subsequently denied Father's request for a continuance and the hearing continued without any further objection or reference to a constitutional challenge.

Giving Father the benefit of the doubt, we will construe this singular reference to the constitutional amendments as a sufficient raising of this issue before the trial court. However, Father failed to give proper notice to the Attorney General that he planned to challenge the constitutionality of a state statute. Tenn. Code Ann. § 29-14-107(b) (2000) provides as follows:

> In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is of statewide effect and is alleged to be unconstitutional, the attorney general and reporter shall also be served with a copy of the proceeding and be entitled to be heard.

Id. In addition, our rules of civil procedure require that, when the constitutionality of a state statute is challenged in an action in which the state is not a party, the trial court "shall require that notice be given the Attorney General, specifying the pertinent statute." Tenn. R. Civ. P. 24.04. The High Court of this state has determined that notice to the attorney general, pursuant to Tenn. Code Ann. § 29-14-107(b), is mandatory. ***Cummings v. Shipp***, 3 S.W.2d 1062, 1063 (Tenn. 1928). Failure to give proper notice to the attorney general when questioning the validity of a statute divests the court of jurisdiction to decide the issue. ***Id.*** Because Father did not take the appropriate steps to give notice to the attorney general of his intent to challenge the constitutionality of Tenn. Code Ann. § 36-1-113(f)(3) before the trial court, we cannot address this constitutional issue on appeal.

Furthermore, we find no abuse of discretion in the manner in which the trial court handled Father's participation in the hearing below. This court has previously been faced with the issue of whether the denial of an incarcerated parent's request to be present at a termination of parental rights hearing is a violation of due process, and we have consistently held that such a denial is *not* violative of due process; rather, the decision to allow the prisoner to be present lies within the sound discretion of the trial court. *See* ***In re Perry***, No. W2000-00209-COA-R3-CV, 2001 WL 277988, at *4-*6 (Tenn. Ct. App. W.S., filed March 12, 2001); ***In re Rice***, No. 02A01-9809-CH-00239, 1999 WL 86980, at *1-*3 (Tenn. Ct. App. W.S., filed February 23, 1999); ***State v. Moss***, No. 01A01-9708-JV-00424, 1998 WL 122716, at *3-*6 (Tenn. Ct. App. W.S., filed March 20, 1998); *see also* ***State v. JCG***, No. E2004-02103-COA-R3-PT, 2005 WL 756245, at *2 (Tenn. Ct. App. E.S., filed April 4, 2005). If a prisoner's access to the court is meaningful – and telephonic access has been deemed to be meaningful – the requirements of due process are satisfied, and the prisoner has no absolute right to be in attendance. ***JCG***, 2005 WL 756245, at *2; ***In re Perry***, 2001 WL 277988, at *5-*6; ***In re Rice***, 1999 WL 86980, at *3; ***Moss***, 1998 WL 122716, at *5. Thus, we find Father had meaningful

access to court by way of his participation in the trial via telephone and find no abuse of discretion in the trial court's decision to proceed with the trial in this case.

C.

Next, Father argues that the plaintiffs' termination petition was insufficient in that it simply alleged "abandonment" as the sole ground for termination, without specifying the type of abandonment relied upon by the plaintiffs. Father contends that this lack of specificity prevented him from preparing a proper defense "to such a bland petition." However, Father's defense at trial – as well as his argument on appeal – belies this contention.

Father was incarcerated on December 11, 2001, and continued to be incarcerated as of the date on which the plaintiffs filed their petition to terminate Father's parental rights. Thus, it is clear that the plaintiffs were relying upon Tenn. Code Ann. § 36-1-102(1)(A)(iv), which pertains to abandonment in the four months preceding the date of the parent's incarceration. Contrary to Father's claim that he "in no way . . . consent[ed] to a trial on the pleadings as drafted," a reading of the trial transcript clearly establishes that Father's counsel was prepared to defend against this type of abandonment, as his counsel questioned both the plaintiff L.C. and Father about Father's visitation and support of the child in the months preceding his incarceration. At a minimum, this issue was tried with the implied consent of the parties.

Moreover, in Father's brief before this court, he begins his third issue as follows:

> In order to show abandonment in this action, *the only available statutory ground* would be that [Father] willfully failed to visit the child for four months prior to his incarceration, T.C.A. § 36-1-102(1)(A)(iv), or willfully failed to support the child for the four months prior to his incarceration. Id.

(Emphasis added). Accordingly, by his own admission, Father was very much aware of the type of abandonment upon which the plaintiffs were relying, and he cannot now be heard to claim otherwise.

Father relies on the case of ***In re W.B., IV***, Nos. M2004-00999-COA-R3-PT & M2004-01572-COA-R3-PT, 2005 WL 1021618, at *10 (Tenn. Ct. App. M.S., filed April 29, 2005), for the proposition that "courts must take a very strict view of procedural omissions that could put a parent at a disadvantage in preparing for trial." Father's reliance on this case is misplaced. In ***In re W.B., IV***, the plaintiffs based their petition to terminate on abandonment for the willful failure to support or visit in the four months preceding the filing of the petition, and the trial court terminated Father's parental rights on that basis. ***Id.***, at *4, *6. However, Father was incarcerated during the entire four-month period preceding the filing of the petition, and, as such, that particular ground had no applicability to him. ***Id.***, at *10. On appeal, the plaintiffs argued that they had also proven abandonment in the four months preceding Father's incarceration. ***Id.*** However, this court found that, because the petition did not allege this type of abandonment, the case must be reversed and

remanded "because to find otherwise would place the parent at a disadvantage in preparing a defense." ***Id.***

In the instant case, the plaintiffs did not allege a ground for termination that was inapplicable to Father and then attempt to prove an applicable ground for termination. Instead, the plaintiffs alleged an applicable ground – albeit, a very general one – and the parties proceeded to try the case with the implicit understanding that the plaintiffs were attempting to prove that Father had abandoned the child in the four months preceding his incarceration. This issue is found adverse to Father.

D.

Finally, Father contends that the evidence was insufficient to prove that he had abandoned the child by willfully failing to visit or by willfully failing to support her in the four months preceding his incarceration. We disagree.

The plaintiff L.C. testified at trial that Father had seen the child, at most, four times in the months preceding his incarceration. The only two occasions on which the plaintiff could say with any certainty that Father had seen the child were on Thanksgiving Day of 2001, and a few days after Thanksgiving, when Father went shopping with the plaintiff for Christmas gifts for the child. By contrast, Father contended that he visited the child on several occasions during those four months. With respect to support, the plaintiff testified that Father had never paid any support for the child, and that the only gifts Father had ever bought the child were the Christmas gifts he purchased shortly before his incarceration with money sent to him by the child's mother. While the testimony is somewhat unclear, it appears that Father was working for a construction company during the summer and early fall of 2001, which would encompass at least a portion of the applicable four-month time period, and he testified that while he was working for that company, he made approximately $200 per month. Father testified that he purchased diapers, milk, and teething rings for the child during that time period, a contention which the plaintiff flatly denied.

As previously noted, the trial court's assessment of witness credibility is entitled to great weight on appeal. The trial court found that Father's testimony was not credible, whereas the testimony of the plaintiffs was credible and "should be accorded the greatest weight." Thus, relying upon case law and the trial court's statement regarding credibility, we find that Father willfully failed to support the child in the four months preceding his incarceration, even though he had the ability to do so. "Failure to visit or support a child is 'willful' when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so." ***In re Audrey S.***, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005) (citations omitted). Furthermore, we find that Father willfully failed to visit the child during the applicable four months. The evidence does not preponderate against the trial court's finding that Father's visitation and support of the child did not even rise to the level of token visitation or support. Accordingly, we find no error in the trial court's finding, by clear and convincing evidence, that Father abandoned the child.

V.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of that court's judgment and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, S.A.N.

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CHARLES D. SUSANO, JR., JUDGE